No. 12539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED: ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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Textbooks

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A. Brigham Rose and Zelletta Rose; Lori, Ltd., Incorporated: Zelletta M. Rose and A. Brigham Rose,

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This cause was heard by this Court on April 11, 1951. A *per curiam* decision was rendered on April 12, 1951.

The opinion states only (1) that the "matters raised by the brief and upon the oral argument present nothing but questions of fact," and (2) that the Court's examination of the record convinces it that "the findings of the Tax Court, including the findings of fraud and negligence, are supported by the evidence."

As even respondent's brief shows, however, the primary questions presented were questions of law. Thus, the question whether, under the facts as found by the Tax Court, the prima facie correctness of the Commissioner's determinations had been overcome, is purely a question of law. Again, the question whether, under the facts as found by the Tax Court, Rose was taxable on all or one-

half of the community income, is distinctly a question of law. Likewise, the question whether, under the fact found by the Tax Court that Rose was the beneficial owner of the Villa Courts, the income therefrom was taxable to Lori or to Rose, is solely a question of law. Further, the question whether, under the facts as found by the Tax Court, Lori was entitled to allowance of an excess profits credit, is strictly a question of law.

The same is true of the question raised in respect to Rose's financial statements. The asset, net worth, and income figures in those statements were elaborately set out by the Tax Court in its findings [R. 444]; and upon those figures that Court expressly and heavily relied [R. 450-451]. The question whether those figures should, because Rose was on a cash basis, have been adjusted by the elimination of accounts receivable and payable, shown on the face of the statements, is purely a question of law.

That question is one involving the interpretation of documentary evidence, and as such is a question of law and not a question of fact.

> *Midwood Associates, Inc. v. Commissioner,* 115 F. 2d 871 (C. A. 2, 1940);
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> *Commissioner v. Buck,* 120 F. 2d 775 (C. A. 2, 1941);
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> *Thornley et al. v. Commissioner,* 147 F. 2d 416 (C. A. 3, 1945).

Such elimination of accounts receivable and payable would have reduced the Tax Court's figure for increase in net worth by $44,000 [R. 560], which is more than the entire difference between the aggregate net income per returns, $37,706.21, and the aggregate net income per Tax Court redetermination, $79,540.06 [R.555].

The effect of this error of the Tax Court was to subject Rose to tax twice on the same $44,000, first in the years in which accrued, and again in the years in which collected. Moreover, it was primarily upon these financial statements that the Tax Court's finding of fraud was based. [R. 450-451.]

These financial statements of petitioner Rose, it may also be observed, were introduced into evidence, not by petitioners, but by respondent, and without any limitation as to the purpose of their introduction. [R. 89-91.] In oral argument, nevertheless, this Court suggested to respondent's counsel that these financial statements could be disregarded as self-serving declarations, and that they were not binding on respondent. Those issues, too, are clearly issues of law, not of fact. Nor was the Court's statement of the law correct. In Jones on Evidence, Fourth Edition, §236, it is stated, citing numerous cases:

> "The objections which have been pointed out above do not hold against the reception of statements of a party where the statements are offered by his adversary.
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> * * * * * * * *
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> "They are, it is true, declarations made out of court and without the sanction of an oath, yet they are statements, not of third persons, but of a party to the litigation; and, where they are offered against him, it is only fair to presume, until the contrary is shown, that they are correct."

Also, in oral argument, the Court raised the question whether the issue as to the Tax Court's error in interpreting these financial statements was timely raised, since it was first raised below after opinion, on a motion for

rehearing. This also is no question of fact, but only one of law.

Disregarding these financial statements, the Tax Court's redetermination was based solely on negative evidence. This negative evidence consists of "unidentified bank deposits" [R. 436], most of which deposits, in fact, the taxpayers clearly identified as non-income deposits. In direct conflict with this meager negative evidence were the financial statements, which are positive evidence of what they show. (See the numerous cases cited by respondent in his brief, pages 31-33, in which, as respondent there observes, redeterminations of net income were sustained on the basis of increases in net worth.) The Tax Court was not aware of this conflict in the evidence before it, because of its misinterpretation of the financial statements. The net result is the same as if the Tax Court had refused to admit certain positive admissible evidence and had based its decision solely on meager negative evidence in conflict therewith.

We submit that it was the duty of this Court to remand this case to the Tax Court so that it might assign weight and consideration to the positive evidence thus in effect excluded by the Tax Court. This Court did just that in *Belridge Oil Co. v. Commissioner,* 85 F. 2d 762 (C. A. 9, 1936).

WHEREFORE, petitioners petition this Court for a rehearing in this proceeding.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

Certificate of Counsel.

Counsel in this proceeding certifies that in his judgment this Petition for Rehearing is well founded and that it is not interposed for delay.

GEORGE T. ALTMAN.